subject always to the limit of $100,000 from the date of his receiving demand for payment thereof. Clause 10 provides that any demand for payment under the guarantee may be made by any officer of the bank or the bank's solicitors by letter sent by post addressed to the guarantor at his specified address or his last place of business or abode. It is true that cl 14 makes each guarantor a principal debtor. But this does not mean that the guarantor is not entitled to a proper demand. After all, the first defendant, the principal debtor, was served with a proper demand. Why should the guarantors to be treated as principal debtors, not be served with the proper demand?

We are unable to agree with the views of the learned judge in this case that no antecedent demand was required to create a cause of action and the mere filing of the writ and the service thereof was a sufficient demand obliging the third defendant to pay. Here the letter of guarantee is clear. A proper demand must be made. It is a condition precedent to establishing a claim against a guarantor.

Appeal allowed.

Solicitors: *Skrine & Co*; *Adam & Co.*

Reported by *Prof Ahmad Ibrahim*

Yeap Leong Huat v Yeap Leong Soon & Anor and another application

SUPREME COURT (KUALA LUMPUR) - CIVIL APPEALS NOS 30 AND 31 OF 1988
LEE HUN HOE CJ (BORNEO), MOHAMED YUSOFF AND AJAIB SINGH SCJJ
24 JULY 1989

Family Law - Chinese customary marriage - Marriage with principal wife - Whether wife principal wife or secondary wife

Succession - Bequest to children of son from principal wife - Whether wife principal wife or secondary wife

Civil Procedure - Appeal - Finding of facts by trial judge - Inferences from established facts

One Yeap Chor Ee left a will wherein he gave bequests to the male children of his son Yeap Hock Hoe 'by wife Kim Lian or his principal wife for the time being to whom he shall be married after the date of this my will'. The facts showed that Yeap Hock Hoe met Yap Kim Lian and took her as his secondary wife in 1944. She bore him two daughters and four sons. During this time Yeap Hock Hoe had a principal wife, Hooi Kum Chee, who lived with him in the family house, 'Homestead'. Yap Kim Lian and her children lived outside. Hooi Kum Chee died in 1948 and some three years after her death Yeap Hock Hoe married her sister Hooi Sooi Wan. The marriage was conducted in Homestead according to Chinese rites and custom in the presence of Yeap Chor Ee and his wife Lee Cheng Kim, the father and mother of Yeap Hock Hoe. Yeap Chor Ee died in 1952 and left a will made in 1950. In 1980 Yeap Hock Hoe died. The plaintiffs, the children of Yeap Hock Hoe and Hooi Sooi Wan claimed to be entitled to share in the residuary estate of the testator. The learned trial judge found on the evidence that Hooi Sooi Wan was the principal wife of Yeap Hock Hoe and therefore the plaintiffs were entitled to take under the will of Yeap Chor Ee. The appellants appealed. The findings of the learned judge was attacked on two main grounds: (1) that the learned judge was wrong to say that Yap Kim Lian was not the principal wife merely on the ground that she did not live in Homestead and (2) the learned judge was wrong to hold that Hooi Sooi Wan was a principal wife as the marriage ceremony held on 22 December 1957 was appropriate to the marriage of a principal wife.

Held, dismissing the appeal:

(1) There was ample evidence on which the learned judge could reach the conclusion which he did that Hooi Sooi Wan is the principal wife of Yeap Hock Hoe and therefore the plaintiffs-respondents are entitled to share in the residuary income of the estate of the testator.

(2) According to Chinese custom a man can have one principal wife at any one time. There cannot be two principal wives existing at the same time. But he can have one or more secondary wives without a principal wife. When Hooi Kum Chee died Yeap Hock Hoe lived at the family house Homestead without a principal wife. Yap Kim Lian was acknowledged as a secondary wife at that time. When Yeap Hock Hoe married Hooi Sooi Wan, she then became his principal wife.

Cases referred to

1 *Lam Wai Hwa & Anor* v *Toh Yee Sum & Ors* [1983] 2 MLJ 302 (folld)
2 *Re Ho Khian Cheong* [1963] MLJ 316 (folld)
3 *Ngai Lau Shia @ Low Hong Sian* v *Low Chee Neo* [1921] 14 SSLR 37 (refd)
4 *Cheang Thye Pin & Ors* v *Tan Ah Loy* [1920] AC 369 (refd)
5 *In the Estate of Yeow Kian Kee (deceased); Er Gek Cheng* v *Ho Yin Seng* [1949] MLJ 171 and 174 (distd)
6 *In re Lee Siew Kow, deceased; Yeo Siew Neo (w)* v *Gan Eng Neo (w)* [1952] MLJ 102 (distd)
7 *Re Lee Gee Chong (deceased); Tay Geok Yap* v *Tan Lian Cheow* [1969] MLJ 102 (distd)
8 *Watt* v *Thomas* [1947] All ER 582 (refd)
9 *Benmax* v *Austin* [1955] 1 All ER 326 (refd)
10 *Tithes Dental a Photo Supply Sdn Bhd* v *Expresa Lineas Maritimes Argentinas & Ors* [1977] 1 MLJ 13 (refd)
11 *Chow Yee Wah & Anor* v *Choo Ah Pat* [1978] 2 MLJ 41 (refd)
12 *Lim Kim Chet & Anor* v *Multar bin Masngud* [1974] 2 MLJ 165 (refd)
13 *Choo Kok Beng* v *Choo Kok Hoe* [1984] 2 MLJ 165 (refd)

HE Cashin (*MS Miki Goh* (*Ms*) with him) for the appellants in Supreme Court Civil Appeal No 30 of 1988.
GS Nijar (*Tan Khek Peng* with him) for the appellants in Supreme Court Civil Appeal No 31 of 1988.
Lim Chor Pee for the respondents.
Goh Eng Kee watching brief for the trustees.

Lee Hun Hoe CJ (Borneo) (delivering the judgment of the court): This appeal is against the decision of Anuar J declaring that the two plaintiffs were the children of Datuk Yeap Hock Hoe by Hooi Sooi Wan, his principal

wife. As such, they are entitled to share in the one-fifth part of the residuary income of the estate of Yeap Chor Ee, their deceased grandfather.

Yeap Chor Ee came from China and settled in Penang when he was 17 years old. He founded the Ban Hin Lee Bank Ltd and many other companies. As a result of hard work he rose to become one of the richest men in Penang. He married a local girl, Lee Cheng Kin, by whom he had one son, Datuk Yeap. They lived in a mansion called 'Homestead' at No 54 Northam Road which was their family house.

In 1933 Datuk Yeap married Ida Oei, daughter of an Indonesian millionaire. The marriage ended in divorce shortly after the birth of a son, Francis Yeap. In his last will Yeap Chor Ee disowned Francis Yeap. In 1942 Datuk Yeap was involved with a woman called Judy Phang who gave birth to a daughter, Angela Yeap. We do not know whether there was a marriage or not. Judy Phang left Homestead and was not heard of again. However, Angela Yeap remained in Homestead and grew up there. During the Japanese Occupation Datuk Yeap married Hooi Kum Chee, then still in her teens, who lived in Homestead. Although there is no evidence of Kum Chee's marriage, Yeap Chor Ee recognized her as Datuk Yeap's wife (see indenture dated 30 December 1946). She seemed to be acknowledged as the principal wife of Datuk Yeap. She gave birth to three daughters and one son Yeap Leong Huat (the second defendant). During his marriage to Kum Chee and sometime in 1943, Datuk Yeap met Yam Kim Lian at the Wembley Arcade where he frequented regularly. Eventually, she became his secondary wife in 1944 and bore him two daughters and four sons, namely, Leong Theam (the third defendant), Leong Keng, Leong How (the fifth defendant) and Leong Chin (the sixth defendant). Kim Lian and her children lived at Lorong Selamat whilst Datuk Yeap and Kum Chee continued to live with his parents in Homestead.

Kum Chee did in 1948 after an operation. She was still in her early twenties, leaving behind four young children, the eldest of whom was five years old and the youngest barely two years. Datuk Yeap was deeply grieved by her death. Some three years later, on 22 December 1951 Datuk Yeap married Kum Chee's younger sister Hooi Sooi Wan, then 20 years old. The marriage was conducted in Homestead according to Chinese rites and custom in the presence of Yeap Chor Ee and Lee Cheng Kin and others. The bride was given a signed marriage certificate. It is not in dispute that Yam Kim Lian also took part in the marriage ceremony and was also given a marriage certificate. In 1957 Datuk Yeap married another wife, Gan Chiew Hiang, who gave birth to three daughters.

To a traditionalist such as Yeap Chor Ee, it was not surprising that Kim Lian was recognized as a wife when by 1949 she had given birth to two sons. This recognition did not mean that she was accepted as a principal wife. She had never moved in to live in Homestead where Datuk Yeap resided. One would expect a principal wife to live in Homestead with her husband. It is hardly an accepted arrangement for a principal wife and her husband to live in separate houses, especially when he lived with his parents in the family house. This is clear from the provisions of the will of Yeap Chor Ee made in 1950. The fact that another son of Yeap Chor Ee lived outside his family house with his principal wife is neither here nor there. Apparently, this was with the consent of his parents.

When a principal wife dies a secondary wife does not automatically assume the mantle of a principal wife. The man can take another woman and make her the principal wife. It is of course possible for the man to promote a secondary wife to become the principal wife. The most significant aspect would be for the man to bring a secondary wife to live with him in the family house. The family house means the house of the man's parents or if he does not live with his parents then the house he was living with his late principal wife. In this case the family house is Homestead, the home of Yeap Chor Ee. The tradition of bringing a secondary wife, on promotion, to the family house is very important. The promotion of a secondary wife to become the principal wife is not merely a matter of form but also of fact. As the learned judge correctly observed at p 57 of his judgement:

> On being admitted to the family home she would assume the status of a principal wife and perform the duties expected of her as a principal wife and as a daughter-in-law of the husband's parents if they are still alive. There must be consent and acceptance by the head of the house. In the words of Tan Sri Lee it is unthinkable for a secondary wife to be promoted to a principal wife without being brought into the family home. The new principal wife takes over the duties of the deceased principal wife in toto. The new principal wife cannot choose to stay where she wishes or refuses to look after the children of the deceased principal wife. The tradition is for the principal wife to stay with the husband. A traditional patriach, like Yeap Chor Ee, would not allow a son to have a wife to stay outside and regard her as a principal wife and have a secondary wife live in the family home.

The defendants are trustees and other persons affected by the claim. Those affected by the claim are Yeap Leong Huat (the second defendant), the son of Datuk Yeap born of the late Hooi Kum Chee and Yeap Leong Theam (the third defendant), Yeap Leong How (the fifth defendant) and Yeap Leong Chin (the sixth defendant), sons of Datuk Yeap born of Yam Kim Lian. Yeap Leong Aun (the fourth defendant), another son of Datuk Yeap died on 23 October 1985 before the hearing.

Yeap Chor Ee died in 1952 in his eighties and left a will made in 1950. He also made a codicil to his will in February 1952. The will came before the court for interpretation. His wife Lee Cheng Kin became the matriach

until she died in 1957. She also left a will. In 1980 Datuk Yeap died.

The plaintiffs claim to be entitled to share in the residuary estate of the testator. The correctness of the decision depends entirely on the assessment of the learned judge of the evidence before him as to whether Hooi Sooi Wan was a principal wife of Datuk Yeap. We need only refer to the relevant provisions of the will:

> 10 I declare that in this my will the following expressions hereinafter used unless excluded by or repugnant to the context shall have the following meanings:
>
> ....
>
> (d) Male child or children of my son Yeap Hock Hoe shall mean his male children Yeap Leong Huat, Yeap Leong Theam and Yeap Leong Keng *and any lawful male child or children of the said Yeap Hock Hoe hereafter born whether in my lifetime or after my decease by his wife Kim Lian or his principal wife for the time being to whom he shall be married after the date of this my will* to the exclusion of any other male child or children or reputed male child or children of the said Yeap Hock Hoe now in existence or hereafter born.
>
> ...
>
> (g) 'Principal wife' in paras (b), (c), (d), (e) and (h) of this clause and where used in this my will means *a wife married in accordance with the ceremonies appropriate to the marriage of a principal wife* or a wife lawfully married under any statutory provision in a monogamous union and shall include a wife married with ceremonies appropriate to the marriage of a principal wife after the death or divorce of a former principal wife of the husband or whilst the husband is separated from an existing principal wife.
>
> 11 ...
>
> 12 ...
>
> (8) After the decease of my son Yeap Hock Hoe or if he shall die in my lifetime then from and after my decease one-fifth part of the residuary income of my residuary estate during the trust period shall be *held upon trust to pay thereout to his secondary wife Kim Lian* the sum of Dollars Five hundred ($500) per month during her life and the sum of Dollars Two hundred ($200) per month to each daughter of the said Yeap Hock Hoe by his wife Kim Lian who shall not have married until she marries and subject to these payments my trustees shall hold the same fifth part of the residuary income during the trust period upon trust (subject nevertheless to the provisions of cl 13 and 14 of this my will) *for such of the following persons or person, namely, his male child or children (as defined in para (d) of cl 10 hereof)* and their male issue in the male line as shall for the time being be living and have attained or shall attain the age of 21 years or have married or shall marry under that age if more than one in equal shares per stirpes but so that a child of the said Yeap Hock Hoe shall take during such child's life to the exclusion of and not concurrently with such child's issue and so that issue of any such child shall take during such issue's life to the exclusion of and not concurrently with his issue, and so that through all degrees issue shall take by substitution if more than one in equal shares the share which his or their father would have taken if living.
>
> ...

The words [in italics] are to show their significance. It is important to note that the will was executed on 9 May 1950 when both the plaintiffs were yet to be born. Clearly the testator intended in cl 10(d) to include future male children of Datuk Yeap born of his secondary wife Kim Lian or 'his principal wife for the time being to whom he shall be married after the date of this my will.' When the will was made the male children of Datuk Yeap in existence then were Leong Huat (the second defendant), Leong Theam (the third defendant) and Leong Keng who were expressly mentioned in cl 10(d).

To establish their claim the plaintiffs would have to prove that their mother Hooi Sooi Wan is the principal wife of Datuk Yeap. Witnesses including experts were called. The contention of the second defendant is that neither Sooi Wan nor Kim Lian was the principal wife. The contention of the third, fifth and sixth defendants is that Sooi Wan is not the principal wife because their mother Kim Lian is the principal wife.

At the time when the will was executed Datuk Yeap had no wife living with him in Homestead. He was then living in Homestead with his five children and his parents. Kim Lian and her children continued to live in Lorong Selamat. If she was, as she claimed, a principal wife in 1949 then the testator would not have referred to her in his will in cl 12(8) as the secondary wife of Datuk Yeap. This is a matter of great significance in deciding her status whatever may be said in support of her status. In Volume IV, Part B at p 220 Lee Siow Mong, one of the experts, gave evidence. He observed that:

> A wife married to take the place of the principal wife is called 'Tien Fang' meaning to fill the room or even locally 'Chiap Kee' means grafting. These terms are descriptive of the functions of the deceased principal wife.

It is not unusual for this purpose among the Chinese for a man to marry the younger sister of his deceased wife. This happened in the case under appeal. At p 221 he went on to say:

> From the will, it would appear that Yeap Chor Ee being a conservative man and traditional he regarded Yeap Hock Hoe as having no principal wife but only a secondary wife. In my opinion, Yam Kim Lian remains as a secondary wife in the eyes of Yeap Chor Ee at the time when he made the will.

He went on to express his view at p 225:

> In my view the second marriage ceremony of Yam Kim Lian was an attempt on the part of Yeap Chor Ee to find a solution to avoid disharmony in the house. The ceremony was not intended to create a status of Yam Kim Lian as a principal wife. It was not possible. The ceremony was to protect the future of Yeap Hock Hoe's future marriage. The marriage of Hooi Sooi Wan in 1951 was a marriage of a principal wife. She thereafter remains a principal wife of Yeap Hock Hoe.

At p 228 he expressed the view that:

> A Chinese man cannot have two principal wives at one time. He can have one principal wife. It is unusual for a Chinese man to have two marriages taking place at the same time and at the same place.

But then Yeap Chor Ee was a broadminded, forward-thinking man. Also, culture, custom and traditions are constantly changing. However, the fundamental requirement of publicity of marriage has never been discarded. Publicity means ceremony at which friends and relatives are present.

Dr Henry Hu, another expert, agreed with what Lee Siow Mong said regarding Chinese customary marriage. He stated that the explanation given by Lee Siow Mong of Chinese custom with regard to Chinese marriages is similar in Hongkong. He considered it to be common for a man to marry the sister of his deceased wife. In his view Hooi Sooi Wan is the principal wife. The marriage was a modern marriage.

It is true that John Robert Clammer said in Vol VII p 442 that:

> ... residence is not critical in establishing a principal wife.

Lee Siow Mong also mentioned that 'if the parents agree a son and his principal wife can live outside the family house'. But there is no clear evidence that the testator agreed to such an arrangement as Datuk Yeap continued to live in Homestead. The strongest evidence that the testator never agreed to such an arrangement was reflected in his will when he stated clearly that Kim Lian was a secondary wife.

Anuar J accepted the opinions of the three experts, particularly that of Lee Siow Mong, and acknowledged their assistance in making his task in deciding the case easier. He pointed out correctly that Kim Lian said that she was already elevated to principal wife in 1949. But Anuar J did not believe her for he remarked at p 62:

> ... However, I am not satisfied that this is so. Although she claimed that she was now elevated to the position of a principal wife she did not move to stay at Homestead. She continued to stay outside. This is most unusual and certainly does not conform with Chinese customs. A principal wife would stay in the family home and not outside. She is expected to stay where her husband stays. In this case, her husband, Yeap Hock Hoe, was staying at Homestead and so if Yam Kim Lian was now promoted to be the principal wife she would be expected to stay in Homestead too. There is no question of choice. On being admitted to the family home she would assume the status of a principal wife and perform the duties expected of her as a principal wife. It is unthinkable for a secondary wife to be promoted to a principal wife without being brought into the family home.

Having regard to the evidence and opinions of experts, Anuar J held that Hooi Sooi Wan is the principal wife of Datuk Yeap and therefore her sons, the plaintiffs, are entitled to share the residuary estate under the will of the testator.

The defendants attacked the findings of the learned judge. First, it was said that the learned judge was wrong to say that Kim Lian was not the principal wife merely on the ground that she did not live in Homestead. Secondly, that the learned judge was wrong to hold that Sooi Wan was a principal wife as the marriage ceremony held on 22 December 1951 was appropriate to the marriage of a principal wife.

In her evidence Kim Lian stated that in 1949 after the death of Kum Chee she was taken to Homestead for the first time to meet her parents-in-law. There she prayed to various deities in the house and offered tea to her parents-in-law and other relatives. She claimed that the ceremony was an indication that she was recognized as the principal wife. Hence, the 1951 ceremony she underwent with Sooi Wan had no significance for her with regard to her marriage and status as a principal wife. She took part in the ceremony to satisfy the wishes of her parents-in-law. It was contended that there was no evidence to contradict her claim that the 1949 ceremony was sufficient to elevate her to the status of a principal wife. This simple ceremony conferred on her the status of a principal wife. *Lam Wai Hwa & Anor* v *Toh Yee Sum and Ors*[1] was cited in support. The Privy Council held that the legal requirements for a principal marriage and a secondary marriage are the same and that in every case where these requirements are followed a valid marriage results. It was further held that the marriage will be a principal or secondary marriage according to whether or not the man already had a wife living. In that case the deceased, a Chinese, married the first appellant according to Chinese custom in 1947. Subsequently, he married the first respondent according to Buddhist rites in 1952. The deceased died intestate in 1960. The appellants obtained the letters of administration in 1961. The respondents received regular monthly payments until payments ceased in 1975. As a result the respondents sued the appellants as administrators of the estate of the deceased. They prayed, inter alia, for declarations that the first respondent and the other respondents were respectively the lawful widow and the lawful issue of the deceased and that they were entitled to share in his estate. Suffian LP, sitting as a High Court judge, granted the declarations sought. The Federal Court dismissed the appeal. The case went to the Privy Council on further appeal to His Majesty the Yang di-Pertuan Agung. In dismissing the appeal, Lord Keith of Kinkel delivering the judgment of the Board stated at p 305:

> The appellants' attack on the validity of the marriage between the deceased and the first respondent must therefore fail. Given that the legal requirements for a principal marriage and for a secondary marriage are the same, it follows that in every case where these requirements are satisfied a valid marriage will result, provided always that the parties have the necessary capacity. The marriage will be a principal marriage or a secondary marriage according to whether or not the man already had a wife living. There can be no doubt that in the present case these legal requirements were satisfied ...

Where a man already has a principal wife then a woman who marries him subsequently can only be a secondary

wife. Thus in *Re Ho Khian Cheong (deceased)*[2] it was held that where a Chinese, having a principal wife living in Singapore, went through a ceremony of marriage with another woman, and such ceremony was appropriate for the purpose of marrying a principal wife according to Chinese custom, both justice and common sense required that the other woman be accorded the status of a secondary wife. But, when a man has a secondary wife or several secondary wives but no principal wife then a woman who marries him subsequently may become a principal wife if the marriage is in accordance with proper Chinese custom and rites. According to Chinese custom a man can have one principal wife at any one time. There cannot be two principal wives existing at the same time. But he can have one or more secondary wives without a principal wife. When Kum Chee died Datuk Yeap lives at Homestead without a principal wife. Kim Lian was acknowledged as a secondary wife at the time.

Lam Wai Hwa's case[1] is a culmination of a series of cases on Chinese customary marriage. In the early days it was difficult to prove the actual essentials of marriage because there was no accepted and uniform practice, not only in Singapore and Malaysia but also in China itself. Hence, experts were invariably called to assist the courts. As time went on the courts began the process of watering down the requirements of proof of a Chinese marriage by invoking the common law technique of presuming a marriage from the evidence of long cohabitation and repute first to secondary marriage and gradually to primary marriage. The court will upon proper evidence presume a secondary marriage between a Chinese man and woman from cohabitation and repute: *Ngai Lau Shia @ Low Hong Sian* v *Low Chee Neo*.[3] According to the Chinese law of marriage, which is applied to Penang in the case of Chinese residents, a Chinese may have secondary wives (sometimes called 'tsips') who have the status of wives and whose children are legitimate. Although some sort of ceremony is usual when a 'tsip' is taken, proof of the performance of a ceremony is not essential to establish the relationship: *Cheang Thye Pin & Ors* v *Tan Ah Loy*.[4]

By 1949 it became established that all that was required for proof of a secondary marriage was mutual consent to be married and that the requirements of a ceremony of a formal contract and of repute of marriage were evidentiary only and not essential to the acquisition of the status of a secondary wife. See *In The Estate of Yeow Kian Kee (deceased)*; *Er Gek Cheng* v *Ho Ying Seng*[5] at p 174; *In re Lee Siew Kow (deceased)*; *Yeo Siew Neo (w)* v *Gan Eng Neo (w)*.[6] In fact as early as 1920 the Privy Council held in *Cheang Thye Pin & Ors* v *Tan Ah Loy*[4] that although some sort of ceremony is usual when a secondary wife is taken, proof of the performance of a ceremony is not essential to constitute a secondary wife. In *Re Lee Gee Chong (deceased)*; *Tay Geok Yap* v *Tan Lian Cheow*[7] the Federal Court upheld the decision of Ambrose J that the respondent was a secondary wife and therefore the lawful widow of the deceased. The learned judge was of the view that to prove a Chinese secondary marriage it was only necessary to prove a common intention to form a permanent union as husband and secondary wife and the formation of the union by the man taking the woman as his secondary wife and the woman taking the man as her husband.

Alongside the common law and customary law of the Kadazans, Ibans and other peoples of Malaysia and Singapore, Chinese customary law was also given recognition by the courts and legislature. The requirements of establishing marriages according to Chinese customary law have been set down by cases over the years. As Chinese customary law is part of the law of the land it is not necessary to prove such law. It is a matter of precedent. The finding of a court of competent jurisdiction is the best evidence of such custom when it is in issue in subsequent cases. Opinions of witnesses including experts and of writers of treaties to which the court have been referred to from time to time are merely to assist the court to come to a proper conclusion.

The plaintiffs submitted that most of the cases cited are concerned with the position of the secondary wife and do not assist us much in deciding the position of the principal wife. The learned judge also expressed the same sentiment. Each case must be decided according to its particular facts. An appellate court should not interfere with the finding of facts by the learned judge who has seen and heard the witnesses and is in a better position to assess their credibilities. On the other hand, the defendants contended that the learned judge erred primarily in drawing the wrong inferences from established facts. It is trite law that, on the question of evaluation of facts, the appellate court is in as good a position as the trial judge to evaluate those facts: *Watt* v *Thomas*;[8] *Benmax* v *Austin*;[9] *Tithes Dental & Photo Supply Sdn Bhd* v *Expresa Lineas Maritimes Argentinas & Ors*;[10] *Chow Yee Wah & Anor* v *Choo Ah Pat*.[11] An appellate court can also review a trial court's decision if the reasons are unsatisfactory and contradictory: *Lim Kim Chet & Anor* v *Multar bin Masngud*[12] or if in reaching its conclusion the learned judge has not properly analysed the entirety of the evidence which was given before him: *Choo Kok Beng* v *Choo Kok Hoe*.[13]

The defendants attacked the findings of the learned judge. The trial took many days. The learned judge has dealt with the various points raised very carefully. Generally, it was contended that there were several features of the evidence that the learned judge failed to consider or from which he failed to draw the proper inferences. The learned judge did take these facts into consideration which turned out to be unfavourable to the defendants. The others cannot, in our judgment, entitle an appellate court to reverse his decision on what is essentially a question of

fact. There was ample evidence on which he could reach the conclusion which he did, that Hooi Sooi Wan is the principal wife of Datuk Yeap and therefore the plaintiffs are entitled to share in the residuary income of the estate of the testator. Accordingly, we would dismiss the appeal with costs. Deposit to plaintiffs to account of taxed costs.

Appeal dismissed.

Solicitors: *Goh Guan Ho; Lim Kean Siew & Co; Tan, Yu & Co.*

Reported by *Prof Ahmad Ibrahim*

Teh Geok Hock v Public Prosecutor

SUPREME COURT (KUALA LUMPUR) - CRIMINAL APPEAL NO 72 OF 1987
HASHIM YEOP A SANI CJ (MALAYA), HARUN HASHIM AND MOHAMED YUSOFF SCJJ
21 JULY 1989

Criminal Law - Dangerous drugs - Trafficking in - Defence that drug was for own consumption and not for trafficking - Whether accused being an addict could also be a drug trafficker - Meaning of trafficking - Burden on accused to rebut presumption - Dangerous Drugs Act 1952, ss 2, 37 & 39B

Evidence - Presumption - Burden on accused to rebut - Dangerous Drugs Act 1952, ss 2, 37 & 39B

Words and Phrases - 'Trafficking' - Dangerous Drugs Act 1952, s 2

In this case the appellant had been charged with trafficking in a dangerous drug, to writ, heroin. When the appellant was arrested he had ten small plastic packets of heroin concealed in the front part of his underpants. The defence of the appellant was that he was at the material time a severe drug addict and that the heroin found on him was for his own consumption. The learned trial judge accepted the evidence of the defence that the appellant was a drug addict on the day of his arrest and that in all probability the addition was quite severe. The learned judge however considered whether the appellant, being an addict, could not also be a drug trafficker within the meaning of the Act. After considering the evidence he rejected the explanation on the ten packets of heroin found on the person of the appellant and was satisfied that the appellant was trafficking in the drugs as charged and convicted the appellant. The appellant appealed.

Held, dismissing the appeal:

(1) The definition of 'trafficking' in the Dangerous Drugs Act is wide and includes not only buying and selling but also carrying, concealing and keeping.

(2) Considering the case from the evidence of both the prosecution and the defence the facts proved fall squarely into the definition of trafficking in the Dangerous Drugs Act. The appellant was found in possession, custody and control of the heroin the weight of which is more than 15 g. This invoked the presumption of trafficking under s 17 of the Act. There is the undisputed evidence of concealment. The appellant also admitted that he bought the drugs for his friends and that he would distribute the drugs to his friends. Finally in his cautioned statement he stated he wanted to sell the drugs to a person he named.

(3) Although the concluding paragraph of the judgment of the learned judge was not couched in clear language to reflect the proper test to be applied, however after reading the whole of his judgment the court was satisfied that what the learned judge meant to say was that having viewed the totality of the evidence he was satisfied that the presumption of trafficking was not rebutted on a balance of probability.

(4) There was ample evidence in this case to convict the appellant on a charge of trafficking in a dangerous drug under the Act and the appeal is accordingly dismissed and the sentence confirmed.

Cases referred to

1 *Ong Ah Chuan* v *PP* [1981] 1 MLJ 64 (refd)
2 *PP* v *Yuvaraj* [1969] 2 MLJ 89 (refd)
3 *Akin Khan bin Abdul Rahman* v *PP* [1987] 2 MLJ 217 (refd)

Legislation referred to

Dangerous Drugs Act 1952 ss 2, 37, 39(B)(2)
Misuse of Drugs Act (Cap 185, 1985 Ed) [Sing]

Sidney Augustin (*K Siva Segara* with him) for the appellant.
Ng Aik Guan (Deputy Public Prosecutor) for the respondent.

Cur Adv Vult

Hashim Yeop A Sani CJ (Malaya) (delivering the judgment of the court): The appellant is charged under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('the Act') that on 20 December 1983 at about 12.50am at No 8, Tepian Loke Yew, Off Jalan Loke Yew, Kuala Lumpur did on his own behalf traffic in a dangerous drug, to wit, 36.97 gm of heroin, thereby committing an offence punishable under s 39B(2) of the Act.

Immediately before his arrest the appellant was with three other male Chinese in a Honda Civic car bearing registration no AAK 2646 which was stopped by the police at the place mentioned in the charge. The appellant was at the time of his arrest 20 years 10 months old.

Throughout the trial the appellant never disputed the fact that at the time of his arrest he had ten small plastic packets of heroin concealed under the front part of his underpants. The packets contained a total of 86.74 g nett of a light brown powdery substance which on analysis the chemist found to contain 36.97 g of heroin.

The prosecution's case was straightforward. The heroin being 36.97 g, the appellant was presumed under s 37(da)(i) to have been trafficking in the drug until the contrary is proved. Thus the learned judge called upon him to make his defence. The appellant gave his evidence on oath and also called five other witnesses. The crux of his defence is that he was at the material time a drug addict, and a severe one at that, and that the heroin found